Ling Peek Hoe & Anor v Ding Siew Ching & Ors and another case

HIGH COURT (IPOH) — CIVIL SUIT NOS (M1) 22–203 OF 2006 AND (M3) 22–45 OF 2008
SU TIANG JOO JC
13 MAY 2022

Civil Procedure — Stay of execution of judgment — Application for — Judgment creditors obtained judgment on damages — Judgment creditors applied for stay of execution of judgment on damages — Whether application for stay ought to be allowed

On 10 January 2022, the court had delivered judgment after assessment of damages ('judgment on damages'). In the said judgment on damages, the court ordered the judgment debtors to pay the judgment creditors RM5,135,951 with interest thereon at 5% pa from the date of the filing of the writ until the date of full settlement with costs. In the present action, the judgment debtors applied for stay of execution of the judgment on damages. The judgment debtors argued that the second judgment creditor had a history of non-compliance with judgments even though entered by consent and they feared that if they were to pay the judgment debt, they would not be able to get it back from the judgment creditors. On the other hand, the judgment creditors argued that the judgment debtors, with the second to fifth judgment debtors being engaged in the business of moneylending, were very wealthy and would have no problems in paying the judgment debt.

Held, allowing conditional stay with costs of RM10,000 to be paid by the judgment debtors to the judgment creditors subject to allocatur:

(1) The judgment debtors had a statutory right of appeal, and their appeals ought not to be rendered nugatory if they were to succeed and unable to recover the return of monies paid. On the part of the judgment creditors, they should not be deprived of the fruits of their litigation. In the present case, there was not an iota of evidence led by the second to fifth judgment debtors on their alleged inability to pay promptly except to assert that time would be required to liquidate the real property, all of which, were identified by the judgment creditors through their investigations rather than being disclosed by the judgment debtors. The inference to be drawn was that the judgment debtors did have the ability to satisfy the judgment debt without difficulty but were not prepared to be candid with their financial means. There was a lack of bona fides on the part of the judgment debtors which ought to be weighed against them in the exercise

of the court's discretion because their financial means was peculiarly within their knowledge. In the circumstances, with the view of balancing the assertions and interest of the parties, the court ordered conditional stay of execution of the judgment on damages (see paras 13–14).

[Bahasa Malaysia summary

Pada 10 Januari 2022, mahkamah telah menyampaikan penghakiman selepas penilaian ganti rugi ('penghakiman mengenai ganti rugi'). Dalam penghakiman mengenai ganti rugi tersebut, mahkamah memerintahkan penghutang-penghutang penghakiman membayar kepada pemiutang-pemiutang penghakiman jumlah RM5,135,951 dengan faedah ke atasnya pada 5% setahun dari tarikh pemfailan writ sehingga tarikh penyelesaian penuh dengan kos. Dalam tindakan ini, penghutang-penghutang penghakiman memohon penangguhan pelaksanaan penghakiman mengenai ganti rugi. Penghutang-penghutang penghakiman berhujah bahawa pemiutang penghakiman kedua mempunyai sejarah ketidakpatuhan terhadap penghakiman walaupun dimasukkan dengan persetujuan dan mereka khuatir jika mereka membayar hutang penghakiman, mereka tidak akan dapat mendapatkannya kembali daripada pemiutang-pemiutang penghakiman. Sebaliknya, pemiutang-pemiutang penghakiman berhujah bahawa penghutang-penghutang penghakiman, dengan penghutang penghakiman kedua hingga kelima terlibat dalam perniagaan pinjaman wang, sangat kaya dan tidak akan menghadapi masalah dalam membayar hutang penghakiman.

Diputuskan, membenarkan penangguhan bersyarat dengan kos sebanyak RM10,000 dibayar oleh penghutang-penghutang penghakiman kepada pemiutang-pemiutang penghakiman tertakluk kepada alllocatur:

(1) Penghutang-penghutang penghakiman mempunyai hak berkanun untuk merayu, dan rayuan mereka tidak sepatutnya menjadi batal sekiranya mereka berjaya dan tidak dapat mendapatkan kembali pemulangan wang yang telah dibayar. Di pihak pemiutang-pemiutang penghakiman, mereka tidak sepatutnya dinafikan hasil litigasi mereka. Dalam kes ini, tiada sedikit pun keterangan yang dikemukakan oleh penghutang penghakiman kedua hingga kelima atas dakwaan ketidakupayaan mereka untuk membayar dengan segera kecuali penegasan bahawa masa diperlukan untuk mencairkan hartanah, yang mana kesemuanya, telah dikenal pasti oleh pemiutang-pemiutang penghakiman melalui penyiasatan mereka dan bukannya didedahkan sendiri oleh penghutang-penghutang penghakiman. Inferens yang boleh dibuat ialah penghutang-penghutang penghakiman mempunyai keupayaan untuk membayar hutang penghakiman tanpa kesukaran tetapi tidak bersedia untuk berterus-terang berkenaan dengan kemampuan kewangan mereka. Terdapat kekurangan bona fides di pihak penghutang-penghutang penghakiman yang harus ditimbang terhadap

mereka dalam melaksanakan budi bicara mahkamah kerana kemampuan kewangan mereka adalah dalam pengetahuan mereka sendiri. Dalam keadaan sedemikian, dengan tujuan untuk mengimbangi hujahan-hujahan dan kepentingan pihak-pihak, mahkamah memerintahkan penangguhan bersyarat ke atas pelaksanaan penghakiman mengenai ganti rugi (lihat perenggan 13–14).]

Cases referred to

China Harbour Engineering Company Ltd v Lunar Shipping Agencies Sdn Bhd [2016] MLJU 1252, HC (refd)

Chubb Samaggi Insurance Public Company Limited v Best Re (L) Limited [2020] MLJU 700; [2020] 1 LNS 574, HC (refd)

Emerald Elegant Sdn Bhd v Projek Lebuhraya Usahasama Berhad [2020] MLJU 2044; [2020] 1 LNS 1837, HC (refd)

Genisys Intergrated Engineers Pte Ltd v UEM Genisys Sdn Bhd (in liquidation) & Ors [2019] MLJU 471, HC (refd)

Golden Cash Harvest Sdn Bhd v Delta-Pelita Sebakong Sdn Bhd [2018] MLJU 1146; [2018] 1 LNS 1181, HC (refd)

Ling Peek Hoe & Anor v Ding Siew Ching & Ors [2022] MLJU 157; [2022] 1 LNS 192; [2022] MLRHU 176, HC (refd)

Mahsurimas Sdn Bhd v Ravinder Singh a/l Shangara Singh & Ors [2019] MLJU 1130; [2019] 1 LNS 1419, HC (refd)

Tan Tieng Sing & Anor v Grobina Resorts Sdn Bhd (No 3) [2006] 5 MLJ 372, HC (refd)

Wu Shu Chen (sole executrix of the estate of Goh Keng How, deceased) v Raja Zainal Abidin bin Raja Hussin & Anor [1995] 3 MLJ 224; [1996] 2 CLJ 353, HC (refd)

Legislation referred to

Federal Constitution art 8

Edmund Lim Yun (with Hong Chong Hang) (Hong Chew King & Co) for the plaintiff.

CK Yeoh (with Stephen Su) (KS Su & Mah) for the first defendant.

Michelle Teoh (Nethi & Saw) for the second, third, fourth and fifth defendants.

Su Tiang Joo JC:

INTRODUCTION

[1] On 10 January 2022, I had delivered judgment after assessment of damages ('the said judgment on damages') with the grounds published as *Ling Peek Hoe & Anor v Ding Siew Ching & Ors* [2022] MLJU 157; [2022] 1 LNS 192; [2022] MLRHU 176. By way of two applications; one filed by the first judgment debtor (R87) and the other filed jointly by the second to fifth

judgment debtors (R93), they applied for a stay of execution of the judgment on damages. I allowed a conditional stay on 13 April 2022 and these are the grounds for the decision made.

JUDGMENT ON DAMAGES

[2] Under the judgment on damages, the judgment debtors are to pay the judgment creditors RM5,135,951.75 with interest thereon at 5%pa from the date of the filing of the writ (18 August 2006) until the date of full settlement with costs.

CHEQUERED HISTORY

[3] The assessment of damages carried out over six days leading to the judgment on damages was conducted only after the judgment debtors have exhausted their rights to appeal against the judgment on liability of 28 November 2012.

[4] In *Ling Peek Hoe & Anor v Ding Siew Ching & Ors* [2022] MLJU 157; [2022] 1 LNS 192, I had occasion to say at para [2]:

> In between the commencement of the suit at the High Court in 2006 and the trial as well as in between the trial and assessment of damages, there were appeals to the Court of Appeal and to the Federal Court. After the Federal Court, there were three applications to review the decision of the Federal Court with the second and third review application struck out for abuse of process of court and the defendants and their lead counsel found guilty of contempt of court.

LAW ON STAY OF EXECUTION

[5] In *Emerald Elegant Sdn Bhd v Projek Lebuhraya Usahasama Berhad* [2020] MLJU 2044; [2020] 1 LNS 1837 at para [13] this court said:

> [13] The law on stay of execution of a judgment has been settled inter alia by:
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> (a) the Federal Court in:
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> (i) *Kosma Palm Oil Mill Sdn Bhd v Koperasi Serbausaha Makmur Sdn Bhd* [2004] 1 MLJ 257; [2003] 4 CLJ 1 where it was held that the applicant has to prove special circumstances such as the appeal being rendered nugatory and in the case of a monetary judgment, the focus ought to be on the inability of the respondent to reinstate the applicant to its original position if it was successful in its appeal; and
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> (ii) *Re Kong Thai Sawmill (Miri) Sdn Bhd; Ling Beng Sung v Kong Thai Sawmill (Miri) Sdn Bhd & Ors (No 2)* [1976] 1 MLJ 131 where it was held that an appeal which would be nugatory if stay was refused

by reason of the poverty of the respondent would be an example of special circumstances.

(b) the Court of Appeal in:

(i) *Ming Ann Holdings Sdn Bhd v Danaharta Urus Sdn Bhd* [2002] 3 MLJ 49; [2002] 3 CLJ 380 where in a money judgment, evidence should be produced to show that the respondent was not in a financial position to repay the applicant if need be; and

(ii) *Kerajaan Malaysia (Jabatan Kerja Raya) v Tropical Profile Sdn Bhd* [2009] MLJU 249; [2010] 7 CLJ 176 where the affidavits of means of the judgment creditor is to be scrutinised on its financial viability to reimburse the amount payable.

[6] At the High Court level, there is the oft-quoted authority of *Wu Shu Chen (sole executrix of the estate of Goh Keng How, deceased) v Raja Zainal Abidin bin Raja Hussin & Anor* [1995] 3 MLJ 224; [1996] 2 CLJ 353 where in an application for stay of execution of a judgment debt of RM25,892,000 it was said:

> In *Eng Yam Construction Sdn Bhd v TAP Properties Sdn Bhd* digested in 2 *Mallal's Digest* (4th Ed, 1994 Reissue) para 1363, the applicant there alleged that the award involved a large sum of money and that if such sum was paid to the respondent, the applicant might not be able to recover it in the event that the action was successful. Abdul Hamid J in dismissing the application held, inter alia, that the fact that a large amount of money was involved did not constitute special circumstances.

THE JUDGMENT DEBTORS' GROUNDS

[7] The judgment debtors laid evidence before the court to assert that the second judgment creditor has a history of non-compliance with judgments even though entered by consent and they fear that if they were to pay the judgment debt, they would not be able to get it back from the judgment creditors, with the second judgment creditor being the son of the first judgment creditor.

[8] In their efforts to counter the principle that the judgment creditors should not be denied the fruits of their litigation, the judgment debtors through learned counsel for the first judgment debtor proposed and which proposal was adopted by learned counsel for the other judgment debtors that a stay of execution be granted on condition that a sum of RM1m be paid immediately with the balance to be secured with an undertaking given by the first judgment debtor, a practising advocate and solicitor, that she will not sell or dispose the properties in the list of properties identified by the judgment debtors, save for the properties set out in the list of properties in para 8 items xiii and xv in encl R91.

THE JUDGMENT CREDITORS' POSITION

[9] It was emphasised that the judgment on damages is one sounding in money and one obtained after having undergone a long and arduous due process of almost 16 years.

[10] The judgment debtors had no hesitation is enforcing an interlocutory order for costs against the two judgment creditors by way of three sets of bankruptcy proceedings as well as by way of three sets of writ of seizure and sale of their movable property.

[11] Through their industry, they were able to lay before the court affidavits complete with exhibits to show that the first judgment debtor alone owns numerous landed properties numbering not less than 16 pieces comprising lands for the commercial cultivation of oil palm and rubber, shop-houses, and a house (R91 para 8) as well as, what was described as a palace ('mahligai') of the third judgment creditor built on seven acres of land (R102 para 4 exh LPHE). This was done to support their assertion that the judgment debtors with the second to the fifth, being engaged in the business of money-lending, are very wealthy and would have no problems in paying the judgment debt.

[12] Learned counsel for the judgment debtors highlighted to the court several decided cases that where a conditional stay was granted, the full amount of the judgment debt was ordered to be secured by payment with at least 50% of the judgment debt to be paid over, see *China Harbour Engineering Company Ltd v Lunar Shipping Agencies Sdn Bhd* [2016] MLJU 1252 (HC), *Tan Tieng Sing & Anor v Grobina Resorts Sdn Bhd (No 3)* [2006] 5 MLJ 372, *Genisys Integrated Engineers Pte Ltd v UEM Genisys Sdn Bhd (in liquidation) & Ors* [2019] MLJU 471 (HC), *Chubb Samaggi Insurance Public Company Limited v Best Re (L) Limited* [2020] MLJU 700; [2020] 1 LNS 574 and *Golden Cash Harvest Sdn Bhd v Delta-Pelita Sebakong Sdn Bhd* [2018] MLJU 1146; [2018] 1 LNS 1181 (HC) and *Mahsurimas Sdn Bhd v Ravinder Singh a/l Shangara Singh & Ors* [2019] MLJU 1130; [2019] 1 LNS 1419 (HC)

COURT'S ANALYSIS AND FINDINGS

[13] In this case, I bear in mind the following:

(a) the judgment debtors have a statutory right of appeal and their appeals ought not to be rendered nugatory if they were to succeed and unable to recover the return of monies paid;

(b) although not articulated in so many words, I understood the learned counsel for the judgment creditors to be asserting that art 8 of the Federal Constitution demands that parties before the court should be entitled to

A equal protection or I would add be treated equally because when the shoe was on the other foot, the judgment debtors had no hesitation in subjecting the judgment creditors to bankruptcy proceedings and having their movable property seized with the view to having them auctioned to recover an order for costs;

B (c) the judgment creditors should not be deprived of the fruits of their litigation in the form of a monetary judgment especially given the chequered history of litigation in their pursuit for justice in this case;

C (d) although the second judgment debtor is in the business of money-lending, with the third to the fifth judgment debtor having a share in this business, they were content to let the first judgment debtor, an advocate and solicitor, lead the charge in these applications for a stay of execution and in this regard, as pointed out by learned counsel for the judgment creditors, there is not an iota of evidence led by the second to fifth judgment debtors on their alleged inability to pay promptly except to assert that time will be required to liquidate the real property, all of which, were identified by the judgment creditors through their investigations rather than being disclosed by the judgment debtors;

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E (e) the inference to be drawn is that the judgment debtors do have the ability to satisfy the judgment debt without difficulty but were not prepared to be candid with their financial means; and

F (f) the judgment debtors were content to dispute on their financial means as discovered and disclosed by the judgment creditors and in other words, there is a lack of bona fides on the part of the judgment debtors which ought to be weighed against them in the exercise of this court's discretion because their financial means is peculiarly within their knowledge.

G CONCLUSION

[14] In the circumstances, with the view to balancing the competing assertions and interest of the parties, this court makes the following order for the two applications (R87 and R93) which are taken together with this single H decision being binding on both because under the judgment on damages, the judgment debtors are jointly and severally liable:

(a) that there be a stay of execution of the judgment on damages subject to the following conditions:

I (i) a sum totalling RM2.5m (representing about 25% of the judgment debt) is to be jointly or severally paid forthwith to the judgment creditors through the solicitors for the judgment creditors within one week from 13 April 2022 ie on or before 12 noon of 20 April 2022;

(ii) the balance of the judgment debt accruing as at 13 April 2022 is to be deposited by the judgment debtors jointly or severally into an interest-bearing bank account to be operated jointly between the solicitors for the judgment creditors and the solicitors for the first judgment debtor within three weeks from 13 April 2022 ie on or before 12 noon of 4 May 2022 with the respective mandated solicitors to undertake to release the same to the successful party or parties as the case may be upon the disposal of the appeals against the judgment on damages at the Court of Appeal; and

(iii) in the event any of the conditions aforesaid are not met, the stay order shall automatically lapse without any further order.

[15] After hearing parties on costs with learned counsel for the judgment creditors seeking RM20,000 and the learned counsel for the judgment debtors offering RM10,000, I awarded to the judgment creditors costs of RM10,000 with a sum of RM5,000 to be paid by the first judgment debtor and a sum of RM5,000 to be paid by the second to fifth judgment debtors with both sets of costs being subject to allocatur.

Conditional stay allowed with costs of RM10,000 to be paid by judgment debtors to judgment creditors subject to allocatur.

Reported by Dzulqarnain Ab Fatar